

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 12, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2009-1178-M
Petitioner,	:	A.C. No. 15-00034-185745-4QM
	:	
v.	:	
	:	
ORICA NELSON QUARRY SERVICES,	:	
Respondent.	:	Mine: Greenville Quarries

DECISION

Appearances: Willow E. Fort, Esq., U.S. Department of Labor, on behalf of the Secretary

Douglas Maggard, Sustainability Director, on behalf of North American Orica USA

Before: Judge David F. Barbour

This case is before me upon a petition for assessment of a civil penalty filed by the Secretary of Labor¹ (“Secretary”) on behalf of the Mine Safety and Health Administration (“MSHA”) pursuant to Section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). The Secretary seeks a penalty of \$2,282.00 for the alleged violation of 30 C.F.R. § 56.6306(c) contained in Citation No. 6508896, which was issued to Orica Nelson Quarry Services (“Orica”), a contractor at the Greenville Quarries mine, pursuant to Section 104(a) of the Mine Act. The Greenville Quarries mine is a surface limestone mine located in Greenville, Kentucky operated by Roadbuilders & Parkway Construction, LLC (“Roadbuilders”).

¹ Hilda L. Solis resigned as Secretary of Labor on January 22, 2013. Thomas E. Perez was sworn in as Secretary of Labor on July 23, 2013.

PROCEDURAL BACKGROUND

After the Secretary filed her penalty petition, Orica answered and contested the validity of the charges contained in the citation. The case was subsequently assigned to me by Chief Administrative Law Judge Robert J. Lesnick. It was consolidated with Docket No. KENT 2009-1142, the Secretary's case against Roadbuilders, and the consolidated cases were set for hearing. The part of the consolidated matter involving Roadbuilders settled prior to hearing, and on April 05, 2012, I issued a decision approving the settlement. *Roadbuilders and Parkway Construction LLC*, Decision Approving Settlement (April 05, 2012). The case against Orica was heard in Chattanooga, Tennessee and is the subject of this decision.

At the close of the hearing, I granted the parties' request for leave to file briefs. Tr. 237. In her brief the Secretary requested that the number of persons affected by the alleged violation of Section 56.6306(c) be increased from "one" to "four", that the degree of negligence be increased from "moderate" to "high" and that a civil penalty of \$11,307.00 be assessed. Sec. Br. 17-18.

THE MINE AND BLASTING PROCEDURES

At Greenville Quarries limestone rock is mined through blasting. The mine has a canyon-like configuration with two side walls and a single highwall on one end. Tr. 61-62. The highwall is 34 feet high and 165 wide. Gov. Ex. 1, Tr. 62. There is a 15 foot wide rock berm on both the left side and right side of the pit adjacent to each of the side walls. Tr. 61. The berms extend the length of the two side walls and end near or at the base of the highwall, narrowing the pit floor to approximately 135 feet. Tr. 61-62, *See* Gov. Ex. 3. A blasting area and production bench are located on top of the highwall. Tr. 61. Limestone is dislodged from the highwall for processing through blasting. Blasting fractures the limestone and propels it out the front of the highwall onto the pit floor below where it is gathered by front end loaders, dumped into haulage trucks, and taken out of the pit for processing. Tr. 28-30. Roadbuilders employs contractors at the mine to prepare the mine site and to conduct blasting. Orica is a blasting contractor at the mine. Tr. 27. As a blasting contractor, Orica provides the blasting materials and lays out the shots.² Tr. 28-29. In preparation for blasting, a separate drill hole contractor drills boreholes into the bench using a drill steel.³ Tr. 45, 64. The drill hole contractor attempts to make the drill holes as vertical as possible, but even with the use of assistive devices, drill bits frequently "wander", resulting in

² A shot occurs when the explosives are blown. Tr. 43.

³ A drill steel is an iron bar or tube approximately 10-12 feet in length with a bit on the end used for drilling vertical boreholes. Tr. 64-65.

Bench is "a name applied to ledges of all types of rock that are shaped like steps or terraces." U.S. Department of the Interior, Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 96 (Paul W. Thrush ed., 1968).

boreholes that are not completely vertical. Tr. 64, 103, 111.

Once the drill hole contractor drills the boreholes, the blasting contractor, in this case Orica, loads the holes with explosives.⁴ Tr. 44-45. A detonator, also known as a cap or blasting cap, and a cast booster are placed at the bottom of each hole.⁵ Tr. 45-46. A lead line is connected to the cap and extended out of the hole. Tr. 49. Orica fills the boreholes with ANFO, a blasting agent, and emulsion.⁶ Tr. 117. The holes are then covered with stemming.⁷ Tr. 46. All the lead lines are tied together and surface caps, also known as surface delays, are placed on the surface. Tr. 46-47. Orica then “runs [the lines] far out.” Tr. 47. Finally, Orica initiates the shot, causing an explosion that fractures the rock, blows it loose from the highwall and propels it forward out onto the pit floor below. Tr. 30, 47. Front end loaders operating in the pit clear the dislodged material away from the base of the highwall, which improves the effectiveness of subsequent shots. Tr. 112. The loaders then load the dislodged material into haul trucks.

STIPULATIONS

The parties stipulated to MSHA’s jurisdiction to conduct the April 7, 2009 inspection of the Greenville Quarries mine. Tr. 18-19. The parties also agreed that the definition of the term “blast site” provided in 30 C.F.R. § 56.2 defines the parameters of the blast site. *Id.*

THE TESTIMONY

On April 07, 2009, Mine Safety and Health Administration (“MSHA”) Inspector Thomas G. Galbreath conducted a regular inspection at the Greenville Quarries mine, accompanied by

⁴ A borehole is “a hole [made] with a drill . . . or other tools . . . for blasting purposes.” U.S. Department of the Interior, Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 125 (Paul W. Thrush ed., 1968).

⁵ The detonator initiates the explosion and the cast booster contains explosive material which provides the explosive force that propagates the explosion. Tr. 45, 48.

⁶ Emulsion is an explosive blasting agent which has a consistency similar to mayonnaise. Tr. 46, 164. The bench at the Greenville Quarries mine is wet. Tr. 46. Without emulsion, which displaces any water present in the boreholes, the blasting agents used at the mine would not work. Tr. 46, 164. ANFO is an explosive blasting agent. Tr. 164.

⁷ Stemming is crushed stone base or another material that is placed in a borehole to direct the force of the blast horizontally toward the face of the highwall. Tr. 46, 48.

Jerry Dozer, the mine superintendent at the time of the inspection.⁸ Tr. 37. Galbreath and Dozer drove to the pit. Tr. 37. Galbreath stated that he exited the truck and when he looked up he observed haulage activity on the production bench on top of the highwall, and he observed miners loading boreholes with explosives on the bench at the top the highwall. Tr. 37. He testified that he observed a 990 loader scooping up shot rock from against the face of the highwall beneath the portion of the highwall that had been loaded with explosives and putting the shot rock onto a haul truck. Tr. 38-40.

In late March or early April 2009, prior to the loading⁹ of the explosives on the highwall, the drilling contractor had drilled four rows, each with 11 boreholes, in an 11 foot by 11 foot pattern on top of the bench on the highwall. Tr. 147, Gov. Ex. 6, pg. 2, Orica Ex. 3. In total, the contractor drilled 44 boreholes, each four inches in diameter and each 34 feet deep vertically, extending from the top to the bottom of the highwall. Tr. 147, 176, Gov. Ex. 6, pg. 2. Galbreath stated one of the blasters told him that 16 boreholes located closest to the left¹⁰ side of the bench (the first four boreholes in each row all four rows back), were loaded, but the lines were not yet connected. Tr. 73-75, Tr. 97. At the hearing, Galbreath circled the 16 loaded boreholes on the left side of the highwall on Respondent's Exhibit 3 ("Resp. Ex. 3"), a diagram of the highwall depicting the location of the boreholes on top of the highwall and the haul truck and loader in the pit. Tr. 97. The other 28 boreholes were not loaded. Galbreath estimated the first row of boreholes was located six feet from the edge of the highwall. Tr. 64.

From the pit floor, Galbreath observed a loader mucking¹¹ in the quarry pit against the bottom of the vertical face of the highwall. Tr. 38. Galbreath testified that he saw the loader

⁸ Galbreath works in MSHA's Lexington, Kentucky Field Office and has been employed by MSHA for approximately 11 years, during which he inspected blasting activities at mine sites. Tr. 21-22. He has received classroom training on blasting from MSHA as well as extensive training from Bill Handshoe, an MSHA blasting expert. Tr. 22. Prior to becoming an inspector, Galbreath was a safety director at an underground coal mine for six years where he was responsible for overseeing blasting operations and providing training. Tr. 24. Galbreath also worked at the mine loading boreholes with explosives, charging the holes then initiating the blasts. Tr. 25.

⁹ "Loading means placing explosive material either in a blasthole or against the material to be blasted." 30 C.F.R. § 56.2.

"Explosive material means explosives, blasting agents and detonators." *Id.*

¹⁰ Unless otherwise stated, all directions are given in relation to a person facing the highwall while standing on the floor of the quarry pit.

¹¹ Galbreath defined mucking as the act of scooping up blasted rock and any other material on the ground with a loader and loading it into a haul truck. Tr. 42.

scoop up shot rock, directly in front of the loaded boreholes and load the shot rock onto a waiting haul truck. Tr. 38-39. This mucking and loading activity had been in progress since the start of the shift that morning. Citation No. 6508896.

Galbreath testified that the loader was mucking within 50 feet of a loaded borehole, in violation of Section 56.6306(c), which, as outlined below, prohibits all activities except blasting and hauling within a 50 foot radius of loaded boreholes. Tr. 64. Galbreath believed the standard was violated because the loader was digging against the base of the highwall which was six feet or less from the first row of eleven boreholes, of which four on the left side were loaded. Tr. 65, *see* Tr. 174, *see* Resp. Ex. 3. Galbreath believed that “bit wander” could have altered the location of the first row of boreholes, moving them closer than six feet from the face of the highwall. Tr. 65. Each borehole was 34 feet deep, extending from the production bench on top of the highwall to the bottom of the highwall. Tr. 64. Galbreath was concerned that the loader mucking against the highwall might dig into a loaded hole and trigger a premature detonation. Tr. 66. Accordingly, at 8:32 a.m., Galbreath issued Citation No. 6508896 to Orica for a violation of Section 56.6306(c). Citation No. 6508896, Gov. Ex. 1. Galbreath thought that a premature detonation was reasonably likely to cause fatal injury to the loader operator. Gov. Ex. 1, Tr. 66. He believed the miners on top of the highwall would also be directly or indirectly affected. Tr. 66. Galbreath found the violation to be a significant and substantial contribution to a mine safety or health hazard (“S&S”). Tr. 67, Gov. Ex. 1. Galbreath concluded the alleged violation reflected Orica’s moderate negligence based, in part, on miner Thurman Grundy’s statement to him that the miners doing the blasting could see the miners in the pit, but were unaware of their exact location. Tr. 68-69. The citation states the violation was terminated when the mucking and haulage activities were moved away from the front of the bench. Gov. Ex. 6, pg. 2.

Thurman Grundy was called as a witness by the company. Grundy is currently retired, but prior to his retirement he had 21 years of experience working with Orica and 19 years of blasting experience. Tr. 146-147. Grundy stated that he was loading the boreholes on the left side of the highwall when Inspector Galbreath arrived at the mine. Tr. 149. Sixteen boreholes on the left side, four holes across and four rows back, were loaded. Tr. 174, Resp. Ex. 3. The other boreholes were not loaded. Tr. 174. The boreholes also were not yet tied together. Tr. 162. Grundy contended that the first row of loaded boreholes was approximately ten feet, not six feet, away from the edge of the highwall. Tr. 176. Grundy denied that the loader was within 50 feet of the loaded boreholes. Tr. 155. He estimated there was a distance of at least 55 feet between the loader and the loaded boreholes. Tr. 169. Grundy testified that he measured the distance at the time, but did not write the measurement down. *Id.* Grundy also testified that because the pit area in front of the loaded side of the highwall was “clean” when he inspected it the previous morning, a loader would not have been mucking at the face in front of the loaded boreholes. Tr. 168. Grundy was aware the loader was mucking at the base of the highwall. Tr. 159. Grundy and the loader operator always wave to each other in the morning to alert the other to his presence. Tr. 168. He testified that the loader was a safe distance from the loaded boreholes because it stayed near the unloaded portion of the highwall. Tr. 159.

William (“Bill”) Handshoe is an experienced blaster licensed in Kentucky, Tennessee, West Virginia and Virginia who works in MSHA’s Knoxville Field Office. Tr. 107-108. He has experience in quarries and coal mines and in loading highwalls. Tr. 109. The Secretary called Handshoe as a witness. Handshoe testified that, in his experience, a drill bit can wander and thus alter the location of a borehole by one to two feet. Tr. 135. As a result, the loaded boreholes could actually be located as close as four or five feet from the face of the highwall. Handshoe stated that the blaster is in charge of the blast site and directs the workforce doing the blasting and the mucking in the pit. Tr. 119. Handshoe believed that the hazard posed by the alleged violation was that the loader could dig into the highwall and trigger a premature detonation, causing fly rock to come out of the highwall and hit anyone in the blast site. Tr. 119. Handshoe testified that though there are many variables to take into consideration, such as cracks and fragmentation of the highwall from the previous blasts, it was “more reasonably likely than not” that a loader mucking in front of the highwall would dig into a loaded borehole. Tr. 113. Given the large size of the loader used in the pit that day, Handshoe thought that it would be easy for its teeth to “grab into the [cast] booster” while it was scooping up rock and cause an explosion. Tr. 114. Handshoe also speculated that emulsion could leak out of a borehole from between pieces of loosened rock and the teeth of the loader could “get into it,” causing an explosion. Tr. 117. Handshoe was not present at the mine on the day of the inspection, but he did not believe the detonation of one borehole was likely to trigger the detonation of the other loaded holes because, based on his examination of a picture of the loaded boreholes, Exhibit GX-3, pg. 2, the lead lines had not yet been attached to the surface caps and connected together. Tr. 130, Tr. 133.

Jerry Dozer testified on behalf of the company. Dozer stated that he accompanied Galbreath into the pit area, though he was not present during the entire inspection. Tr. 193-194. Dozer is currently retired, but he had approximately 33 years of experience with Orica prior to retiring and for three of those years he worked for the company at the Greenville Quarry mine. Tr. 181. He stated that the first row of boreholes, the row closest to the edge of the highwall, was roughly eight to ten feet from the edge. Tr. 183. He observed the loader mucking against the right side of the highwall then loading shot rock onto a truck. Tr. 193. He testified that no mucking occurred on the left side where the boreholes were being loaded because the left side had been mucked out the day before. Tr. 186.

Michael Music was a witness for Orica. Music is retired, but occasionally consults for the mining industry. Tr. 206. He has approximately four years of blasting experience and has worked for MSHA as an inspector, as a field office manager, and as chairman and a member of MSHA’s Highly Explosive Standards Committee. Tr. 207-208, Tr. 225. Music testified that blasting at the site would have caused significant cratering on the highwall, making the face “cracked and weak.” Tr. 220. Music speculated that the distance from the edge of the highwall to the four boreholes closest to the edge of the highwall was greater than six feet. Tr. 221. Music was not present during the inspection and did not observe the condition of the highwall. Tr. 224.

THE VIOLATION

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>
6508896	04/07/2009	56.6306(c)

The citation states:

The blasting contractor did not assure that the blast site area was secure before loading explosives. A Cat 990 front end loader was mucking in the quarry pit below the bench w[h]ere explosives were being loaded into [boreholes]. The loader was digging against the face of the highwall and loading trucks against the highwall being loaded. The highwall was approximately 34 feet in height and the [boreholes] were approximately 34 feet deep. The holes were already charged with emulsion and a cast booster/cap. The [boreholes] were approximately six feet from the edge at the top of the bench. A hazard of the loader digging into a charged hole or a premature detonation existed. This hazard would cause a fatal injury to a miner. This process had existed since the start of the shift this morning. Two blasters were working on top of the bench loading the blast holes.

Citation No. 6508896.

Section 56.6306(c) provides:

Once loading begins, the only activities permitted within the blast site shall be those activities directly related to the blasting operation and the activities of surveying, stemming, sampling of geology, and reopening of holes, provided that reasonable care is exercised. Haulage activity is permitted near the base of a highwall being loaded or awaiting firing, provided no other haulage access exists.

30 C.F.R. § 56.6306(c).

Section 56.2 defines a blast site as follows:

Blast site means the area where explosive material is handled during loading, including the perimeter formed by the loaded blastholes and 50 feet (15.2 meters) in all directions from loaded holes. A minimum distance of 30 feet (9.1 meters) may replace the 50-foot (15.2-meter) requirement if the perimeter of loaded holes is demarcated with a barrier. The 50-foot (15.2-meter) and alternative 30-foot (9.1-meter) requirement also apply in all directions along the full depth of the hole.

30 C.F.R. § 56.2.

For the reasons that follow, I find that the Secretary has established a violation of Section 56.6306(c). Inspector Galbreath credibly testified that he observed a loader loading a haul truck directly beneath loaded boreholes, well within the blast site. Galbreath's testimony is consistent with his findings in the citation and is corroborated by his contemporaneous inspector's notes, which state that he observed a loader loading a haul truck "*against* the highwall being loaded" (Citation No. 6508896 (emphasis added)) directly in front of loaded boreholes. Gx. 6, pg. 2.

Prior to issuing the citation, Galbreath went up to the top of the highwall and observed the location of the loaded boreholes and the proximity of the loader to those boreholes. *See* Tr. 63. Though Galbreath did not provide measurements or estimates of the distance between the haul truck and the loaded portion of the highwall, he has substantial experience with blasting, and based on his statement in the citation that the loader was loading the haul truck *against* the loaded highwall, I credit his finding that prohibited loading activities were taking place within the blast site. In my view, the record clearly supports finding that the loader and the haul truck were in close proximity to the loaded portion of the highwall, well within a 50 foot radius, while this loading activity was taking place and thus, were within the blast site. Grundy and Dozer contend that the haul truck was located on the right side of the pit, away from the loaded holes. However, Grundy and Dozer's testimony regarding the location of the haul truck lacked specificity and unlike Galbreath's testimony, was not corroborated by contemporaneous notes.

I further find that although the standard specifically allows haulage activity near the base of the highwall being loaded, provided no other haulage access exists, the loader's activities do not fall within the definition of haulage. Galbreath and Handshoe persuasively defined hauling as the transportation of material away from the blast site. Tr. 60, Tr. 115-116. They agreed that haulage does not include loading. *Id.* Similarly, the *Dictionary of Mines, Mineral and Related Terms* defines haulage as, "[t]he drawing or conveying . . . of men, supplies, ore and waste both underground and on the surface." U.S. Department of the Interior, Bureau of Mines, *Dictionary of Mines, Mineral and Related Terms* 530 (Paul W. Thrush ed., 1968)(emphasis added). Here, the activity that triggered the violation was the loading of the haul truck.

NEGLIGENCE

Inspector Galbreath determined the violation was the result of Orica's moderate negligence. In her brief, the Secretary requested that the level of negligence be increased to high. Sec. Br. 18. I find that such an increase is warranted. The Mine Act holds operators and contractors to a high duty of care. The blasting contractor has a duty to ensure the safety of miners within the blast site. Galbreath credibly testified that Grundy was aware miners were working in the pit while it was preparing the shot, but was unaware of their exact location.

Grundy testified that the loader was a safe distance from the loaded boreholes and would not have been mucking in the pit below the loaded portion of the highwall because that area was “clean.” I find Galbreath’s testimony, which is corroborated by his contemporaneous notes, to be the more persuasive. Gov. Ex. 2. Orica knew that there were miners working in the pit beneath the highwall while it loaded explosives and should have remained aware of the activities of those miners as it continued to load explosives. The miners in the pit were likely to be seriously injured or killed if a premature detonation occurred. Accordingly, I find that Orica’s negligence was high.

GRAVITY

Galbreath believed that the hazard to which the violation contributed was a premature detonation triggered by the loader digging into a loaded borehole. Inspector Galbreath determined that if a premature detonation occurred it could result in serious or fatal injuries, and I agree. To gauge the gravity of a violation I must assess the effect of the hazard if it occurs, *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996). In this instance, if a premature detonation occurred, the loader operator, the haul truck driver and the miners doing the loading on top of the highwall could be hit by flying rock and would have sustained broken bones, internal injuries or they could have been killed. The violation was clearly serious.

S&S

A violation is properly designated as S&S if the violation is a significant and substantial contribution to the cause and effect of the hazard. 30 U.S.C. § 814(d). To establish the S&S nature of a violation, the Secretary must prove: “(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard - that is, a measure of danger to safety - contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.” *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Powder Co., Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir 1988)(approving *Mathies* criteria). It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129(Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 498, 500 (Apr. 1988)(quoting *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984)). It is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1575 (July 1984).

I have found that Orica violated Section 56.6306(c) when the loader loaded a haul truck within the blast site and that if the hazard identified by the Secretary, a premature detonation triggered by the loader digging into a loaded borehole or explosive material, were to occur it

would result in serious or fatal injuries. However, I also find that the Secretary did not prove that the hazard was reasonably likely to occur and thus, failed to establish the third *Mathies* criterion. Galbreath testified that he observed the loader mucking directly in front of the loaded boreholes and was concerned that the loader would dig into a loaded borehole. Tr. 66. However, this testimony is not supported by his inspector's notes, which state, "[L]oading activity was taking place in front of the loaded bench . . . The loader was digging *on the opposite side of the bench.*"¹² Gov. Ex. 2 (emphasis added). The Secretary's other witness, Handshoe, did not personally witness the violation and the Secretary did not clarify this inconsistency. Nor did Galbreath mark the photos he took when he issued the citation to indicate the relative location of the loader to the loaded boreholes. The Secretary has failed to establish whether the loader was mucking in front of the loaded holes. Indeed, the inspector's notes indicate that the loader was mucking on the unloaded side of the bench, which is consistent with the testimony of Grundy and Dozer. Orica contends that not only was the loader not mucking underneath the loaded boreholes when Inspector Galbreath observed the loader, it also would not have later begun mucking under the loaded holes. Both Grundy and Dozer credibly testified that the left side of the pit at the base of the highwall had previously been mucked out and was "clean".

Neither Galbreath's notes nor his testimony nor Handshoe's testimony persuade me that it was reasonably likely that the loader, which was mucking at the face by the unloaded side of the bench, would dig into a loaded borehole, even with allowances made for bit wander of one to two feet.¹³ The record fails to show that the loader was operating close enough for that to happen. Though Handshoe testified that it was "more reasonably likely than not" that the teeth of the loader could dig into emulsion that had leaked out from between fractured rock and cause a premature detonation, he also admitted that such an outcome was dependent on a variety of factors, which were identified, but not developed through his testimony or that of the Secretary's other witness, Handshoe, and Handshoe had no personal knowledge of the facts nor did he observe the condition of the highwall. Moreover, the record does not support finding that the emulsion, if it leaked, would reach the area where the loader was operating.

I am mindful that a significant and substantial determination must be made based on the particular facts surrounding the violation. As noted above, the violation was triggered when the loader loaded the haul truck directly in front of the loaded boreholes. However, it was the loader's mucking activities, not the loading of the truck, which Inspector Galbreath testified was the potential trigger for the identified hazard - a premature detonation. Galbreath testified that

¹² I assume that one haul truck at a time was being loaded with mucked material. Though the citation and Galbreath's notes refer to two trucks, Dozer confirmed that Orica was rotating two trucks to remove the mucked material (Tr. 193) and both the Secretary and the Respondent's witnesses only made reference to one truck.

¹³ Music testified that prior blasting could have made the face of the highwall "cracked and weak," but, as stated above, he did not personally observe the condition of the highwall and his speculative statements do not persuade me to change my determination.

the loader was mucking in front of the loaded boreholes, but this testimony is contradicted by his inspector's notes, which state that the loader was mucking at the face on the unloaded side of the highwall, and by the testimony of Grundy and Dozer. I find the Secretary did not establish that a premature detonation was reasonably likely and failed to establish that Orica's violation of the standard was a significant and substantial contribution to a mine safety or health hazard.

NUMBER OF PERSONS AFFECTED

The Secretary requested in her brief that the number of persons affected be increased from "one" to "four." Sec. Br. 18. Handshoe argued that had a premature detonation occurred, four people, the blaster and the helper on top of the highwall and the loader operator and the truck operator in the pit, would all be affected. Tr. 119-120. Handshoe testified that the blaster and helper on top of the highwall would be affected because once the blast is initiated, even when stemming is used, fly rock still comes out the top of the borehole. Tr. 120-121. I credit this testimony and I find that four persons were affected by the violation.

HISTORY OF PREVIOUS VIOLATIONS

In the two year period prior to the inspection at issue, Orica paid civil penalties for 23 violations, 5 of which were violations of Section 56.6306. Gov. Ex. 7. This is a moderately large history of previous violations. *See* 30 C.F.R. § 100.3(c)(1).

SIZE AND ABILITY TO CONTINUE IN BUSINESS

_____ According to Exhibit A, which is attached to the Secretary's penalty petition, Orica worked 237,646 annual hours, making it a large contractor. In the absence of evidence to the contrary, I find that the assessed penalty will not affect the Respondent's ability to continue in business. *See Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983)(finding the mine operator has the burden of showing that the penalty will have a detrimental effect on its ability to continue in business).

GOOD FAITH ABATEMENT

Orica promptly and effectively abated the violation by moving the haul truck and the loader. The penalty proposed by the Secretary reflects a reduction for good faith abatement.

<u>CITATION NO.</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>ASSESSMENT</u>
6508896	56.6306(c)	\$2,282.00	\$2,000.00

In her brief the Secretary argued that an increase in the proposed penalty to \$11,307.00 is appropriate based on her proposed findings regarding Orica's negligence and the number of

persons affected and is in accordance with the penalty criteria set forth in 30 C.F.R. § 100.3.¹⁴ Commission judges determine civil penalties *de novo*. I have considered the civil penalty criteria and conclude that, in light of the circumstances, particularly my finding of high negligence, my finding that four persons were affected by the violation and my determination that the Secretary failed to establish the identified hazard was reasonably likely to come to fruition, a civil penalty of \$2,000.00 is more appropriate.

It is **ORDERED** that Citation No. 6508896 be **MODIFIED** to delete the inspector's significant and substantial finding, to reduce the likelihood of injury to "unlikely," to increase the number of persons affected to "four," and to increase the degree of negligence to "high."

It is further **ORDERED** that the Respondent pay a penalty of \$2,000.00 within 30 days of the date of this decision.¹⁵ Upon receipt of payment, this case is **DISMISSED**.

/s/ David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution:

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¹⁴ The Secretary did not file a motion to amend the penalty petition. Instead, she raised this argument for the first time in her brief, a dubious practice, as the court previously noted in *Performance Coal Company*, 35 FMSHRC ___, slip op. at 2, n.3, No. WEVA 2008-1825 (August 16, 2013).

¹⁵ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390.